87-415

Supreme Court, U.S.
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No. _____

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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NORTHERN PLAINS RESOURCE COUNCIL; TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION; ROSEBUD PROTECTIVE ASSOCIATION; and TRI-COUNTY RANCHERS ASSOCIATION,

Petitioners,

-vs-

THE UNITED STATES OF AMERICA; the INTERSTATE COMMERCE COMMISSION; and the TONGUE RIVER RAILROAD COMPANY,

Respondents.

---o---

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether landowners affected by the construction and operation of a common carrier railroad have standing to challenge the certification of that railroad by the Interstate Commerce Commission when the landowners' challenge is founded upon a provision of the Mineral Lands Leasing Act which generally precludes common carrier railroads from acquiring a federal coal lease.

PARTIES TO ACTION

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The parties to this proceeding are the Northern Plains Resource Council, a Montana non-profit corporation; the Tongue River Agriculture Protection Association, an unincorporated association; the Rosebud Protective Association, an unincorporated association; the Tri-County Ranchers Association, an unincorporated association; the Interstate Commerce Commission, an agency of the United States of America; and the Tongue River Railroad Company, a limited partnership.

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No. _____

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NORTHERN PLAINS RESOURCE COUNCIL; TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION; ROSEBUD PROTECTIVE ASSOCIATION; and TRI-COUNTY RANCHERS ASSOCIATION,

Petitioners,

-vs-

THE UNITED STATES OF AMERICA; and the INTERSTATE COMMERCE COMMISSION; and the TONGUE RIVER RAILROAD COMPANY,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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The Northern Plains Resource Council, a Montana non-profit corporation, Tongue River Agriculture Protection Association, an unincorporated association, Rosebud Protective Association, an unincorporated association, and the Tri-County Ranchers Association, an unincorporated association, petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINION BELOW

The judgment of dismissal of the petition for review filed by the Northern Plains Resource Council, Tongue River Agriculture Protection Association, Rosebud Protective Association, and Tri-County Ranchers Association, Ninth Circuit Court of Appeals docket number 86-7344, is an unreported decision. The Ninth Circuit Court of Appeals dismissed the Petition for Review filed by the Petitioners, concluding that the Petitioners lacked standing to contest the Interstate Commerce Commission's approval of the Tongue River Railroad Company's applications for authority to construct a railroad and to issue securities to finance construction. Petitioners sought judicial review of the Commission's decision pursuant to Title 28, United States Code, §§2321 and 2342. The unpublished opinion of the Ninth Circuit Court of Appeals is dated May 12, 1987 (App. A., infra, 1a-4a). The Court of Appeals denied the Petition for Rehearing on June 11, 1987 (App. B, infra, 1b).

JURISDICTION OF THIS COURT

This Court's jurisdiction to review the decision of the Ninth Circuit Court of Appeals in this matter is

conferred by 28 U.S.C. §1254(1).

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STATUTORY PROVISIONS INVOLVED

The texts of the following statutory provisions relevant to the determination of the present case are set forth in the Appendix (App. C, infra, 1c-9c).

Generally, the Mineral Lands Leasing Act, 30 U.S.C. §202, provides that no common carrier railroad shall hold a federal lease for coal deposits except for its own railroad purposes (App. C, infra, 1c).

Generally, the Transporation Act, 49 U.S.C. §10901, requires the approval of the Interstate Commerce Commission before the construction of a rail line (App. C, infra, 2c-4c); additionally, the Transportation Act, at 49 U.S.C. §11301, requires the approval of the Interstate Commerce Commission before a regulated carrier may issue securities (App C, infra, 5c-9c). The construction of a railroad line can be approved by the Interstate Commerce Commission only upon its finding that the public convenience and necessity will be served. 49 U.S.C. §10901(c)(1). Securities may be issued only if the Interstate Commerce Commission finds that the issuance of the securities: (i) is for a lawful object; (ii) is

compatible with the public interest; (iii) is appropriate for or consistent with proper performance by the carrier; and (iv) will not impair the financial ability of the carrier to provide service. 49 U.S.C. §11301(d)(1).

STATEMENT OF THE CASE

In 1983, the Tongue River Railroad Company applied for authority from the Interstate Commerce Commission to construct an eighty-nine mile common carrier railroad with termini at Miles City, Montana and Ashland, Montana. In 1984, the Tongue River Railroad Company applied for authority from the Interstate Commerce Commission to issue securities to finance construction of the railroad. Hearings were held on both applications in January, 1985. In May, 1986, the Interstate Commerce Commission entered its decision approving both applications.

The Northern Plains Resource Council, Tongue River Agriculture Protection Association, Rosebud Protective Association, and Tri-County Ranchers Association (hereinafter collectively referred to as "Petitioners" or "NPRC") opposed both applications on environmental grounds and upon the ground that the Interstate Commerce Commission's approval of the applications would give rise to a violation of §2(c) of the

Mineral Lands Leasing Act, 30 U.S.C. §202.[1] NPRC attempted to obtain judicial review of the Interstate Commerce Commission decision in the Ninth Circuit Court of Appeals. Northern Plains Resource Council, et al., v. United States of America, et al., Ninth Circuit Court of Appeals (No. 86-7344). On May 12, 1987, the Court of Appeals dismissed NPRC's petition for review ruling that NPRC lacked standing to seek review of the agency action (App. A, infra, 1a-4a). NPRC's petition for rehearing was denied on June 11, 1987 (App. B, infra, 1b).

HISTORY OF THE CASE

Members of the petitioning organizations include landowners whose property will be crossed by the Tongue River Railroad Company right-of-way. These landowners are opposed, on several grounds, to the agency decision which authorizes both the construction of the railroad and the issuance of securities to finance that construction.

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1. Section 2(c) of the Mineral Lands Leasing Act, (App. C, infra 1c), generally prohibits the sale of a federal coal lease to a common carrier railroad. One of the Tongue River Railroad Company's general partners is affiliated with the owner of a federal coal lease.

First, these landowners object to the environmental damage that will result from the construction and operation of the railroad.[2] Second, the landowners opposed the railroad on the ground that one of the Tongue River Railroad Company's general partners, Transportation Properties, Inc., is affiliated with Thermal Energy, Inc., the owner of federal coal lease M-54714.[3] NPRC argued that since §2(c) of the Mineral Lands Leasing Act precluded the sale of a federal coal lease to a common carrier railroad, the Interstate Commerce Commission could not authorize the construction and operation of a railroad which was controlled by an entity already owning a federal coal lease.

The Interstate Commerce Commission, on May 1, 1986, authorized the sale of securities and construction of the railroad and found that, while it must consider §2(c) in

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2. NPRC did not pursue the environmental objections in its Petition for Review presented to the Ninth Circuit.

3. The propriety of the sale of federal coal lease M-54714 has been challenged by the Northern Cheyenne Tribe in Northern Cheyenne Tribe v. Hodel, Ninth Circuit Court of Appeals (No. 86-4403). United States District Judge James F. Battin suspended coal lease M-54714 in Northern Cheyenne Tribe v. Hodel, U.S. District Court, District of Montana (No. CV-82-116-BLG).

rendering its decision, a violation of §2(c) would occur only when the railroad began operations. The Commission therefore concluded that it should presently authorize construction of the railroad but would withhold operating authority from the railroad pending a determination by the agency charged with enforcing §2(c), the Department of Interior, whether a §2(c) violation exists.

NPRC petitioned the Ninth Circuit Court of Appeals for review of the Interstate Commerce Commissioner's decision. After briefs were filed, the Circuit Court of Appeals dismissed the appeal on the ground that NPRC lacked standing to raise a challenge based upon §2(c). In so ruling, the Court of Appeals held that only competitors of the railroad or coal owners or operators have standing to raise challenges pursuant to §2(c) (App. A, infra, 4a). Because NPRC did not fall within the "zone of interests" of §2(c) as defined by the Ninth Circuit, the appellate court concluded that NPRC lacked standing. Id.

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WHY THE WRIT SHOULD BE GRANTED

A. SUMMARY OF ARGEMENT.

This petition presents a case whereby the Ninth Circuit Court of Appeals has decided a federal question,

relating to the standing of an aggrieved party to challenge federal agency action, in a manner in conflict with the applicable decisions of this Court. The Ninth Circuit Court of Appeals has, through its dismissal of the proceedings before it, reduced the class of people who are permitted to protest administrative action, contrary to the trend enunciated by this Court in its decisions which enlarges that class. See Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L.Ed.2d 184 (1970).

B. THE RULING THAT AFFECTED LANDOWNERS LACK STANDING TO PROTEST THE AUTHORIZATION TO CONSTRUCT A RAILROAD AND THE AUTHORIZATION TO ISSUE SECURITIES TO FINANCE CONSTRUCTION IS CONTRARY TO THE DECISIONS OF THIS COURT OTHERWISE ENLARGING THE CLASS OF PEOPLE WHO MAY PROTEST FEDERAL ADMINISTRATIVE ACTION.

This Court should grant the Writ of Certiorari because the decision of the Ninth Circuit Court of Appeals dismissing NPRC's Petition for Review on standing grounds is in direct conflict with applicable decisions of this Court. See Clarke v. Security Industries Ass'n, 479 U.S. ____, 107 S.Ct. 750, 93 L. Ed.2d 757 (1987); Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. ____, 106 S.Ct. 2860, 92 L. Ed.2d 166, (1986); Block v.

Community Nutrition Institute, 467 U.S. 340, 104 S.Ct. 2450, 81 L. Ed.2d 270 (1984); and Association of Data Processing Service Organizations, Inc. v. Camp, supra, 397 U.S. 150, 90 S.Ct. 827.

The Ninth Circuit Court of Appeals ruled that Petitioners have no standing to challenge the action of the Interstate Commerce Commission (herinafter referred to as "ICC" or the Commission) on the basis of §2(c) of the Mineral Lands Leasing Act because Petitioners are not "interested parties" (App. A, infra, 4a). The Ninth Circuit reasoned that, absent an affiliation to the coal industry or an allegation of unfair competition, Petitioners could not be heard to complain about a violation of §2(c) that would occur as a result of the ICC's certification that the Tongue River Railroad is in the public convenience and necessity. The Ninth Circuit recognized that the Petitioners were adversely affected or aggrieved by the ICC decision, but ruled, in dismissing the Petition for Review, that Petitioners' injuries did not fall within the zone of interests to be protected or regulated by §2(c). The Circuit Court did not consider Petitioners' challenge in the context of the Transportation Act, 49 U.S.C. §10901 and 49 U.S.C. §11103.

Petitioners sought review of the ICC certification on the basis that, through certification of the railroad, the Interstate Commerce Commission had countenanced a

controversion of the requirements of §2(c) of the Mineral Lands Leasing Act and had permitted the Tongue River Railroad Company to achieve indirectly that which it could not achieve directly, i.e., the ownership of a federal coal lease by a common carrier railroad. Petitioners argued that such a situation was inconsistent with the "public interest" mandate implicit in the Transporation Act, 49 U.S.C. §10901, and contrary to the requirement that any proposed issuance of securities by a common carrier railroad be only for a "lawful object." 49 U.S.C. §11301. The Circuit Court of Appeals ignored Petitioners' arguments which were based upon the Transportation Act and instead simply concluded that Petitioners could not even raise any questions concerning §2(c) of the Mineral Lands Leasing Act because Petitioners were not coal producers or transportation parties.

The Circuit Court of Appeals decision is contrary to and offensive to the "trend . . . toward enlargement of the class of people who may protest administrative action." See Association of Data Processing Service Organizations, Inc., supra, 397 U.S., at 154, 90 S.Ct., at 830.

A party has standing to challenge administrative action if that party can demonstrate that he is adversely affected or aggrieved by the action and that the interest which he seeks to protect is "arguably within the zone of

interests to be protected or regulated by the statute or constitutional guarantee in question." See Association of Data Processing Service Organizations, Inc., supra, 397 U.S., at 153, 90 S.Ct., at 829. The "zone of interest" formula elucidated in Data Processing requires broad interpretation of the phrase "a relevant statute." Clarke v. Securities Industry Ass'n, supra, 479 U.S., at ____, 107 S.Ct., at 756. The "zone of interest" formula also incorporates the "trend" toward the enlargement of the class of people who may protest administrative action. Id. Judicial review of agency action, under this formula, is presumptively available. See Block v. Community Nutrition Institute, supra, 467 U.S., at 348, 104 S. Ct., at 245; Clarke v. Securities Industry Ass'n, supra, 479 U.S., at _____, 107 S.Ct., at 757. This presumption can be overcome, however, only where the congressional intent to preclude judicial review is "fairly discernable in the statutory scheme." Block v. Community Nutrition Institute, supra, 467 U.S., at 351, 104 S.Ct., at 2457; Clarke v. Securities Industy Ass'n, supra, 479 U.S., at ___, 107 S.Ct., at 757. The essential inquiry to be made is whether Congress "intended [for a particular] class [of Plaintiffs] to be relied upon to challenge agency disregard of the law." Block v. Community Nutrition Institue, supra, 467 U.S., at 347, 104 S. Ct., at 2455. The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency actions

presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency action. Block v. Community Nutrition Institute, supra, 467 U.S., at 351, 104 S.Ct., at 2457; Clarke v. Securities Industry Ass'n, supra, 479 U.S., at ___, 107 S.Ct., at 757.

When the party contesting the agency action is not itself the subject of the contested regulatory action, this Court's standing opinions denies a right of review to the challenger only when the challenger's interests "are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke v. Securities Industry Ass'n, supra, 479 U.S., at _____, 107 S.Ct., at 757. This test is "not meant to be especially demanding; in particular, there need be no indication of

congressional purpose to benefit the would-be plaintiff." Id. [4]

The Ninth Circuit Court of Appeals dismissed the Petition for Review because "§2(c) of the Mineral Lands Leasing Act was enacted for the protection and benefit of competing coal interests from unfair competition." See Order at 2 (App. A, infra, 2a). The Court concluded that, since the Petitioners are not in the coal business or involved in the production or distribution of energy of any sort, they were not within the zone of interests protected by §2(c) of the Mineral Lands Leasing Act. Id. The Ninth Circuit disregarded this Court's rulings relating to standing by erecting this hurdle for Petitioners to overcome.

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4. Clarke v. Securities Industry Ass'n was decided by this Court on January 14, 1987. NPRC's Petition for Review was submitted to the Ninth Circuit Court of Appeals on April 8, 1987, and the Circuit Court's decision dismissing the appeal was filed on May 12, 1987. When this Court decided the Clarke case and provided its statement of the zone of interest test "as now formulated," Clarke, supra, 479 U.S., at n. 15, 107 S.Ct., at 757 n. 15, it was giving guidance to the judiciary concerning the issue of standing. Petitioners submit that the Ninth Circuit Court of Appeals expressly disregarded this Court's recent pronouncements on standing by simply concluding that since Petitioners are not coal producers, they cannot be heard to complain about the action of the Interstate Commerce Commission in this case.

Petitioners are not required to show any "indication of congressional purpose to benefit" them to have standing, as required by the Ninth Circuit. Clarke, supra, 479 U.S., at _____, 107 S.Ct., at 757. Rather, Petitioners are presumptively entitled to judicial review of the ICC's decision and need not point to any "separate indication of congressional intent to make agency action reviewable; instead, the rule is that the cause of action for review of such action is available 'absent some clear and convincing evidence of legislative intention to preclude review'." See Japan Whaling Ass'n v. American Cetacean Soc., supra 478 U.S., at _____, 106 S.Ct., at 2866; Block v. Community Nutrition Institute, supra, 467 U.S., at 345, 104 S.Ct., at 2455.

The Ninth Circuit Court of Appeals has incorrectly equated the position of the Petitioners in this action with the position of the consumers in Block v. Community Nutrition Institute, supra, 467 U.S. 340, 104 S.Ct. 2450. That case involved the statutory scheme relating to milk price orders, which this Court described as "a cooperative venture among the Secretary [of Agriculture], producers, and handlers" of milk products. This Court reviewed the purpose of this statutory scheme and the methods designed by Congress to achieve that purpose and concluded "that consumer participation is not provided for under the complex scheme enacted by Congress." Block v. Community Nutrition Institue, supra, 467 U.S., at 351, 104

S.Ct., at 2457. In Block, this Court concluded that consumer suits would have undermined the congressional preference for administrative remedies and would have disrupted administration of the congressional scheme. In the context of that case, this Court concluded that Congress intended to preclude the judicial review sought by the petitioners because its intent to preclude that review was "fairly discernable" in that statutory scheme. In different situtations, however, "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of adminstrative action is controlling." Block, supra, 467 U.S., at 351, 104 S.Ct., at 2457.

The Ninth Circuit's simplistic and unsophisticated analysis of standing in this case leaves Petitioners with no forum in which to litigate their injuries. Petitioners are landowners whose property will be irrevocably affected by construction of the railroad. Petitioners' ranching operations will be irrecovably altered and their interests in the quiet enjoyment of their property rights will be irrevocably altered. These consquences result directly from the action of the Interstate Commerce Commission which allows the Tongue River Railroad to construct its railroad. In L. Singer & Sons v. Union Pacific Railroad, 311 U.S. 295, 61 S.Ct. 261, 85 L.Ed. 198 (1940), Court ruled that a complainant challenging ICC action must, to

establish "standing", assert something more than a common concern for obedience to the law. According to Singer, a challenger has "standing" if it is possessed of a definite legal right that is seriously threatened by agency action. Id., 311 U.S., at 304, 61 S.Ct., at 258; accord, Concord Township v. U.S., 625 F.2d 1068 (3rd Cir. 1980). Petitioners submit that injury to their interests as affected landowners constitute injury in fact within the zone of interests to be protected by the Transporation Act, 49 U.S.C. §10901 and 49 U.S.C. §11301, and the Mineral Lands Leasing Act, 30 U.S.C. §202.

Nothing in the Transportation Act reveals a "fairly discernable" congressional intent to preclude the judicial review that Petitioners here seek. See Block, supra, 467 U.S., at 351, 104 S.Ct., at 2456. Indeed, the Transporation Act contemplates that shippers, carriers and all those parties directly affected by a proposed transporation scheme have interests that are subject to judicial review within the context of that statutory scheme. Petitioners in the case at bar are directly affected by the transportation scheme sought to be established by the Tongue River Railroad Company. Petitioners' arguments that the Interstate Commerce Commission decision granting a certificate of public convenience and necessity to the railroad is unlawful should be heard because nothing in the Transporation Act evidences a congressional intent,

fairly discernable, to preclude that review, and moreover, with respect to standing under §2(c), because there "need be no indication of congressional purpose to benefit the" Petitioners. See Clarke v. Securities Industry Ass'n, supra, 479 U.S., at ___; 107 S.Ct., at 757.[5]

The Ninth Circuit Court of Appeals has disregarded the generous and liberal standing decisions of this Court and has held Petitioners to an inappropriately onerous threshold standing requirement. The reported opinions of this Court clearly demonstrate that Petitioners have standing to seek judicial review of the decision of the Interstate Commerce Commission; the Ninth Circuit Court of Appeals had disregarded these rulings.

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5. This Court's decisions relating to standing reflects its concern that the protesting party be "a reliable private attorney general to litigate the issues of the public interest . . ." Association of Data Processing, supra, 397 U.S., at 154, 90 S.Ct., at 830; Clarke v. Securities Industry Ass'n, supra, 479 U.S., at _____, 107 S.Ct., at 756 n.12. Here, NPRC is a reliable private attorney general having exclusively challenged the certification before the Commission. If NPRC is denied standing, there will be no review of the lawfulness of the challenged agency action.

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CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals should be granted.

Respectfully Submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, a Montana non-profit corporation; TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION, an unincorporated association; ROSEBUD PROTECTIVE ASSOCIATION, an unincorporated association; TRI-COUNTY RANCHERS ASSOCIATION, an unincorporated association, Petitioners. -v- INTERSTATE COMMERCE COMMISSION, Respondent, THE TONGUE RIVER RAILROAD COMPANY, Intervenor, UNITED STATES OF AMERICA, Respondent.	)	No. 86-7344 ICC No. 30186 MEMORANDUM

Petition to Review a Decision of the Interstate Commerce Commission

Submitted ** April 8, 1987
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 3(f) and Fed. R. App. P. 34(a).

Before: BROWNING, WRIGHT, and HALL, Circuit Judges.

Northern Plains Resource Council (NPRC) appeals the Interstate Commerce Commission's (ICC) May 9, 1986 decision granting a certificate of public convenience and necessity to the Tongue River Railroad Company (TRRC) to construct and finance a 89-mile common carrier railroad pursuant to 49 U.S.C. §§10901 and 11301. The sole issue challenged by the NPRC on appeal is whether the ICC's decision violates section 2(c) of the Mineral Lands Leasing Act, 30 U.S.C. §202. We dismiss the appeal because the appellants lack standing to sue under section 2(c).

STANDING

The TRRC, the intervening appellee, argues that

section 2(c) of the Mineral Lands Leasing Act was enacted for the protection and benefit of competing coal interests from unfair competition. It also argues that, since the appellants are not in the coal business or involved in the production or distribution of energy of any sort, their interests are not within the "zone of interests" protected by section 2(c). We agree.

To have standing to obtain judicial review of a challenged agency action, a plaintiff must establish that it has suffered an injury in fact and that its interests are arguably within the zone of interests to be protected or regulated by the statute that the plaintiff claims the agency violated. See 5 U.S.C. §702; Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

The zone of interests protected by section 2(c) is limited. Concerns over railroad monopolization of the coal industry led to the passage of section 2(c). Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 271-72 (7th Cir. 1986). It was enacted because of a concern that, if railroads were allowed to own coal mines, they would discriminate in their rates for transportation against competing coal mines which depend on rail transportation. Id. Section 2(c)'s legislative history reveals that Congress intended the section 2(c) prohibition

to protect independent coal companies from unfair competition. See 58 Cong. Rec. 4739 (1919) (remarks of Sen. LaFollette).

The appellants are Northern Plains Resource Council, Tongue River Agriculture Protection Association, Rosebud Protection Association, and Tri-County Ranchers Association. They are landowners arguably affected by the ICC's decision. None of the appellants compete with the TRRC. Their only claim on appeal is the alleged section 2(c) violation. While competitors of the TRRC or someone in the coal business may have standing to complain of a section 2(c) violation, see National Coal Ass'n v. Hodel, 617 F. Supp. 584, 588 (D.D.C. 1985), the appellants here are not "within the zone of interests protected" by section 2(c). Cf. Block v. Community Nutrition Institute, 467 U.S. 340, 348 (1984) (while milk handlers have the right to seek judicial review of pricing orders issued by the Secretary of Agriculture under the Agricultural Markerting Agreement Act of 1937, consumers have no such right).

APPEAL DISMISSED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, a Montana non-profit corporation; TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION, an unincorporated association; ROSEBUD PROTECTIVE ASSOCIATION, an unincorporated association; TRI-COUNTY RANCHERS ASSOCIATION, an unincorporated association,	)	No. 86-7344
	)	ICC No. 30186
	)	ORDER
Petitioners.	)	
-v-	)	
INTERSTATE COMMERCE COMMISSION,	)	
Respondent,	)	
THE TONGUE RIVER RAILROAD COMPANY,	)	
Intervenor,	)	
UNITED STATES OF AMERICA,	)	
Respondent.	)	

Beore: BROWNING, WRIGHT, and HALL, Circuit Judges:

The petition for rehearing is denied.

APPENDIX C

30 U.S.C. §202

§202. Common carriers; limitations of lease or permit

No company or corporation operating a common-carrier railroad shall be given or hold a permit or lease under the provisions of this Act for any coal deposits except for its own use for railroad purposes; and such limitations of use shall be expressed in all permits and leases issued to such companies or corporations; and no such company or corporation shall receive or hold under permit or lease more than ten thousand two hundred and forty acres in the aggregate nor more than one permit or lease for each two hundred miles of its railroad lines served or to be served from such coal deposits exclusive of spurs or switches and exclusive of branch lines built to connect the leased coal with the railroad, and also exclusive of parts of the railroad operated mainly by power produced otherwise than by steam.

Nothing in this section [30 USCS §§ 201, 202, 202a] shall preclude such a railroad of less than two hundred miles in length from securing one permit or lease thereunder but no railroad shall hold a permit or lease for lands in any State in which it does not operate main or branch lines.

49 U.S.C. §10901

§10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the judrisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.] may - -

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line; only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall - -

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerncing the application.

(c)(1) If the Commission —

(A) finds public convenience and necessity, it may - -

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the

Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

49 U.S.C. §11301

§11301. Authority of certain carriers to issue securities and assume obligations and liabilities.

(a) In this section –

(1) "carrier" means a rail or sleeping car carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title [49 USCS §§10501 et seq.] (except a street, suburban, or interurban electric railway not operated as a part of a general railroad system of transportation), and a corporation organized to provide transportation by rail carrier subject to that subchapter. [49 USCS §§10501 et seq.]

(2) "security" means a share of capital stock, a bond, or other evidence of interest in, or indebtedness of, a carrier.

(b)(1) Subject to subchapter I of chapter 2A, chapter 2B, and subchapter I of chapter 2D of title 15 [15 USCS §§ 77a et seq., 78a et seq.. 80a-1 et. seq.], the Commission has exclusive jurisdiction to approve the issuance of securities by a carrier and the assumption of an obligation or liability related to the securities of another person by a carrier. A

carrier may not issue securities or assume those obligations or liabilities without the approval of the Commission. No other approval is required. A security issued or obligation or liability assumed by a carrier in violation of this subsection or in violation of a condition prescribed by the Commission under subsection (d) of this section is void. However, a security or obligation issued or assumed under authority of this section is not void for failure to comply with a procedural requirement of this section or other matter preceding entry of the order of the Commission.

(2) Paragraph (1) of this subsection does not apply to notes issued by a carrier if the notes mature not more than 2 years after their date of issue and total (with all then outstanding notes having a maturity of not more than 2 years) not more than 5 percent of the par value of the then outstanding securities of that carrier. If the securities do not have a par value, the par value of those securities is the fair market value on the date of issue. Paragraph (1) of this subsection applies to a subsequent funding of notes referred to in this paragraph.

(c)(1) A carrier issuing notes referred to in subsection (b)(2) of this section shall file a certificate of notification with the Commission by the end of the 10th day after they are

issued. That notification must include substantially the same matter required by the Commission for an application for authority to issue other securities.

(2) A carrier that pledges, repledges, or otherwise disposes of a security referred to in an application for authority or a certificate of notificiation under this section as pledged or held unencumbered in the treasury of that carrier shall file a cerificate of notificiation with the Commission by the end of the 10th day after it disposes of the security.

(d)(1) The Commission may begin a proceeding under this section on application of a carrier. Before taking final action, the Commission must investigate the purpose and use of the securities issue or assumption and the proceeds from it. The Commission may approve any part of the application and may require the carrier to comply with appropriate conditions. After an application is approved under this section, the Commission may change a condition previously imposed or use that may be made of the securities or proceeds for good cause shown subject to the requirements of this section. The Commission may approve an application under this section only when it finds that the securities issue or assumption - -

(A) is for a lawful object within the corporate purpose of the carrier and reasonably appropriate for that purpose;

(B) is compatible with the public interest;

(C) is appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier; and

(D) will not impair the financial ability of the carrier to provide the service.

(2) An application or certificate must be made under oath and signed and filed for the carrier by a designated executive officer who knows the matters stated in the application or certificate. On receipt of an application of a carrier under this section, the Commission shall have a copy of the application served on the chief executive officer of each State in which that carrier operates. The appropriate authorities of those States are entitled to be admitted as parties to a proceeding under this section to represent the rights and interests of their people and States.

(e) The Commission shall require a carrier that issues securities, including notes, under this section to submit reports to it. The reports must identify the disposition of those securities and the application of the proceeds from their disposition.

(f) This section does not imply a guaranty or obligation of those securities by the United States Government. This section does not apply to securities issued or obligations or liabilities assumed by the United States Government, a State, or an instrumentality or political subdivision of one of them.